No. 15-70329 (L), 15-70345

In the United States Court of Appeals for the Ninth Circuit

15-70329 (L)

DIRECTV HOLDINGS, LLC,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFC-CIO, DISTRICT LODGE 947,

Respondent-Intervenor.

15-70345

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFC-CIO, DISTRICT LODGE 947,

Petitioner-Intervenor,

v.

DIRECTV HOLDINGS, LLC,

Respondent.

ON PETITION FOR REVIEW FROM DECISIONS OF THE NATIONAL LABOR REVIEW BOARD, NLRB No. 21-CA-071591

THIRD BRIEF ON CROSS APPEAL

PETITIONER DIRECTV HOLDINGS, LLC

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SUMMARY OF ARGUMENT

The Board's and the Union's briefs repeat the same flawed arguments from the Board majority's opinion and fail to reconcile contrary law and evidence. Neither the Board nor the Union disputes that six Circuits have rejected the majority's position that disciplinary recommendations cannot be "effective" under Section 2(11) of the National Labor Relations Act if there is an "independent investigation" by higher-level management. And neither addresses those Circuits' determination that such a categorical exception is flatly inconsistent with plain text of Section 2(11).

Even if this Court were to disagree with those six Circuits, and adopt an "independent investigation" exception, there is no evidence here that Field Supervisors' recommendations are subject to an independent investigation. The record evidence clearly shows that those recommendations are only *reviewed* by upper management—and accepted in the vast majority of cases. That review process does *not* constitute an "independent investigation." It is undisputed that the managers and those in Human Resources who review a Field Supervisor's recommendation accept the Field Supervisor's assertion of the violation "at face value." No one in the review process independently speaks with the Field Technician who is the subject of the recommended disciplinary action in order to obtain his or her side of the story.

The Court should reject the Board majority's conclusion that this review process constitutes an "independent investigation" because it lacks substantial evidence. The undisputed evidence establishes (1) that no reviewer—not the Site Manager, the Operations Manager, or anyone in Human Resources—independently investigates to determine whether a violation, in fact, occurred or whether the recommended discipline is warranted; (2) that all reviewers rely heavily on the Field Supervisor's findings, judgment, and recommendations; and (3) that the recommended discipline has a real potential to impact—and has impacted—the Field Technician's job status.

Because the Board majority's decision is incorrect as a matter of law and lacks substantial evidence, the Court should grant DIRECTV's petition for review and deny the Board's cross-petition for enforcement.[1]

[1] For the Court's information, we note that the unfair labor practice complaint in this case was issued by Acting General Counsel Lafe Solomon on January 11, 2012. In *Hooks v. Kitsap Tenant Support Services, Inc.*, Case No. 13-35912, the Court has been presented with the question of whether Acting General Counsel Solomon lacked authority to issue complaints based on defects in his appointment under the Federal Vacancies Reform Act ("FVRA"). The U.S. Court of Appeals for the District of Columbia Circuit recently held that Solomon was invalidly holding office between January 5, 2011 and November 4, 2013. *SW General, Inc. v. NLRB*, Case No. 14-1107 (D.C. Cir. Aug. 8, 2015). The D.C. Circuit found that "the [FVRA] prohibited him from serving as Acting General Counsel from [January 5, 2011] forward." *Id.* at slip op. 19. Because the statutory authority to issue complaints against employers and unions emanates from the General Counsel, the D.C. Circuit vacated the NLRB's order in that case. *Id.* at slip op. 5, 20 ("without a valid complaint, the Board could not find Southwest liable for a ULP").

ARGUMENT

I. Six Circuits Have Correctly Rejected The Board's Independent-Investigation Exception.

Section 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11), does not require that a supervisor possess final authority to take disciplinary action. It is sufficient that a supervisor possesses the authority to "effectively" recommend such action. The Board majority, however, has added a qualification to the statutory language by creating an "independent investigation" exception. The Board held that an independent investigation by higher-level management precludes an "effective" recommendation even if, as in this case, the evidence shows the supervisor's recommendation is accepted in the vast majority of cases. E.O.R. 47; DIRECTV Br. 19.

The Board does not dispute that the vast majority of Circuits to address the issue—the Second, Third, Fourth, Fifth, Sixth, and Seventh Circuits—have rejected this independent investigation exception because it is "inconsistent with the Act," *ITT Lighting Fixtures, a Div. of ITT Corp. v. NLRB*, 712 F.2d 40, 45 (2d Cir. 1983), and because it would "render the statutory phrase 'effectively to recommend' nugatory," *Caremore, Inc. v. NLRB*, 129 F.3d 365, 370 (6th Cir. 1997). *See also NLRB v. Attleboro Assocs., Ltd.*, 176 F.3d 154, 164 (3d Cir. 1999) (citing, *inter alia*, *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 683 n.17 (1980)); *NLRB v. Winnebago Television Corp.*, 75 F.3d 1208, 1216 (7th Cir. 1996). Further, as the Third,

Fourth, and Fifth Circuits have held, "the very fact that the Employer considered that these recommendations justified the time and expense of an investigation reflects the substantial significance attached to them." *NLRB v. S. Airways Co.*, 290 F.2d 519, 524 (5th Cir. 1961); *Attleboro*, 176 F.3d at 164 n.9; *Glenmark Assocs., Inc. v. NLRB*, 147 F.3d 333, 343 (4th Cir. 1998).

In its brief, the Board does not directly confront the reasoning of those Circuits. Instead, it cites (at 18-19) the decisions of three other courts—the First, Eighth, and D.C. Circuits—that have purportedly approved the Board's current position. But the Board does not even attempt to explain why this Court should split with the vast majority of Circuits, which has determined that the Board's view is incorrect and not entitled to deference. *Cf. NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 714 (2001) (rejecting Board's interpretation of Section 2(11) that "insert[s] a startling categorical exclusion into statutory text that does not suggest its existence"); *see also Sandusky Mall Co. v. NLRB*, 242 F.3d 682, 689 (6th Cir. 2001) ("[W]e owe no deference to the Board's holding if it is not legally sound.").

Moreover, none of the court decisions that the Board cites squarely addressed the issue here—whether the independent investigation exception is a proper interpretation of Section 2(11). In *NLRB v. Hilliard Development Corp.*, the Board argued that in order to prove that an employee "effectively recommends" rewards, one must show "[1] a 'direct correlation' between the evaluations and

merit increases or bonuses to the evaluated employees, and [2] the employee's supervisors do not independently investigate or change the ratings." 187 F.3d 133, 145 (1st Cir. 1999). The First Circuit ruled on only the first element: "The Board has thus interpreted 'effectively recommend' to require a 'direct correlation.' *This* standard is to be given deference because it is neither irrational nor contrary to the plain language of the Act." *Id*. (emphasis added). It said nothing about the independent investigation element. And if anything, *Hilliard* actually undercuts the Board's position on the independent investigation element, as the First Circuit stressed that "[t]he mere fact that an action is subject to review and to being countermanded by a higher-up employee does not alone mean that the acting employee is not a supervisor." *Id*. at 146 (citing *NLRB v. Metro. Life Ins. Co.*, 405 F.2d 1169, 1177 (2d Cir. 1968)).

Although both *Waverly-Cedar Falls Health Care, Inc. v. NLRB*, 933 F.2d 626, 630 (8th Cir. 1991), and *Jochims v. NLRB*, 480 F.3d 1161, 1170-71 (D.C. Cir. 2007), applied the independent investigation exception, those courts did not analyze whether the exception is a proper construction of Section 2(11) or address the six Circuits that have rejected that construction. Therefore, *Waverly-Cedar* and *Jochims* are not persuasive authority for departing from the six Circuits that have squarely addressed this issue.

The standard advocated by the Board and the Union in this case is a patently unreasonable interpretation of Section 2(11). As the Union explains in its brief, this standard requires DIRECTV or any other employer to show that any review of a supervisor's disciplinary recommendation is" meaningless" and is nothing more than a "rubber stamp." Union Br. 1, 5. "Thus, the Board, as a practical matter, requires the employer to prove that each level of review is automatic and a rubber stamp in order to prove the initiation of the process is the finality of the process." *Id.* at 4. The statute, however, only requires that a supervisor's recommendation be an "effective" one. To hold, as the Board and the Union advocate, that a recommendation is "effective" only if it is automatically rubber-stamped by upper management is a strained and unreasonable interpretation of the statutory language. A recommendation can be effective even if it is reviewed and considered, in a meaningful way, by upper management. Upper management need not blindly rubber stamp its supervisor's recommendations in order to meet the statutory standard.

Contrary to the Board's assertion (at 28), Section 10(e) of the Act, 28 U.S.C. §160(e), does not foreclose this Court from considering this statutory issue. DIRECTV had no obligation to file an exception to the Hearing Officer's decision on this issue because the Hearing Officer ruled in DIRECTV's favor, determining that "the review is not an *independent* investigation." E.O.R. 32 (emphasis in original); *see Local 65-B, Graphic Commc'ns Conf. of the Int'l Bhd. of Teamsters v. NLRB*,

572 F.3d 342, 349 (7th Cir. 2009) ("The ALJ did not make an adverse finding to the union on that point, however. They would have had no need to file an exception on that point.").

Furthermore, this Court has explained that the purpose of §160(e) is to provide courts with "the benefit of the Board's opinion when we review its decision." *Int'l Union of Painter & Allied Trades, Dist. 15, Local 159 v. J & R Flooring, Inc.*, 656 F.3d 860, 867 (9th Cir. 2011). Here, the Court has that benefit. The majority applied the independent investigation exception. E.O.R. 46-47. Dissenting, Member Hayes cited *Eastern Greyhound Lines v. NLRB*, 337 F.2d 84, 89 (6th Cir. 1964), for the proposition that a supervisor can "effectively recommend[] discipline using independent judgment ***despite*** *recommendations being subject to independent investigation before final action*." E.O.R. 47-48 (emphasis added). Thus, the relevance of an independent investigation under Section 2(11) was an issue that was explicitly considered by the Board and, therefore, is appropriate for review in this Court.

II. The ECF Process Is Not An Independent Investigation.

The "independent investigation" issue is ultimately a red herring in this case because the ECF review process is not an independent investigation. As dissenting Member Hayes found, "there is no evidence of any independent investigation as part of the three-level review." E.O.R. 47-48 n.1.

The Board heavily relies (at 20) on testimony by Site Manager Schultz that, in deciding whether to approve an ECF, he "reviews the employee's past performance and any prior corrective measures and might, for example, look at the employee's file or ask questions about the employee." Such a review is not, however, an *independent* investigation.

It is undisputed that no one in the review process conducts any independent factual investigation or seeks to obtain the Field Technician's version of the events. E.O.R. 32; E.O.R. 45-47; Board Br. 20-22. Instead, all reviewers accept the Field Supervisor's "assertion of a violation … at face value." E.O.R. 32. Relying solely on the Field Supervisor's finding of a violation without speaking with the Field Technician is not an "independent investigation" in any legitimate sense of the term.[2]

To illustrate: A prosecutor charges a defendant (assertion of a violation) and recommends a sentence (disciplinary recommendation). In reviewing the sentencing recommendation, the trial court, intermediate court, and the final appellate court (three-level review) all simply accept the prosecutor's assertion of the violation and never allow the defendant to present any evidence or mitigating circum-

[2] The Board tries to minimize (at 21) that undisputed evidence by arguing that the reviewers merely accept Field Supervisors' "objective fact reporting." That is not accurate. In addition to accepting the underlying facts, the reviewers also accept "at face value" the Field Supervisor's "assertion of a violation" of company policy. E.O.R. 32; *see also* DIRECTV Br. 16, 42-43.

stances. Surely, no one would consider that an independent investigation. Yet that is the functional equivalent of the Board's position here.

The Board majority's decision in this case cannot be reconciled with its prior precedent. *See* DIRECTV Br. 39-40 (citing cases establishing that Board decision cannot stand if it departs from prior precedent without explanation). In *Progressive Transportation Services, Inc.*, 340 NLRB 1044, 1045 (2003), the Board held that no independent investigation occurred when the manager "decides the level of discipline and advises [the supervisor] on the wording of the discipline notice *based on the incident as [the supervisor] describes it*." (Emphasis added). And in *Venture Industries, Inc.*, 327 NLRB 918, 919 (1999), the Board found that supervisory authority existed even though the supervisor's "department manager conduct[ed] a followup investigation about 30 to 40 percent of the time to hear the employee's side of the incident."

Those cases cannot be reconciled with this case, where the evidence establishes that Field Supervisors draft the ECFs themselves and recommend a level of discipline. DIRECTV Br. 16. And as the Hearing Officer found, no one in the review process conducts any independent investigation into the Field Supervisor's findings or speaks with the employee who is the subject of the ECF. E.O.R. 32. In fact, the Hearing Officer found that Field Supervisors remain an integral part of the entire ECF process. E.O.R. 32. For example, Site Manager Schultz testified that

he reviews recommendations in consultation with Field Supervisors, because he recognizes that Field Supervisors "know the activities of the technician[s] best." E.O.R. 78; DIRECTV Br. 19. With respect to Operations Managers and Human Resources, Field Supervisor Flores testified that "[m]ost of the time," both accept his recommendations and merely provide changes concerning "styling" or "the words being used." E.O.R. 110.[3] Flores also testified that he "participate[s] in any discussion between the operations manager and the site manager" regarding terminations. E.O.R. 125; Board Br. 27 n.10 (conceding same).

Therefore, even if an independent investigation were dispositive under Section 2(11)—and it is not—no such investigation occurred in this case.

III. DIRECTV Places Significant Weight In Field Supervisors' Disciplinary Recommendations.

The Board again misconstrues the law and facts in arguing that DIRECTV failed to establish that it gives sufficient weight to Field Supervisors' disciplinary recommendations. As DIRECTV established (at DIRECTV Br. 37-42), the Board's precedent unequivocally (and quite sensibly) holds that the frequency with which the employer accepts the recommendations sufficiently establishes effective recommendation:

[3] Thus, there is also no merit to the Board's suggestion (at 23 n.7) that "DIRECTV presented no evidence concerning the extent to which it modifies the ECFs that are not rejected."

> The issue of supervisory status turns on the extent to which his decision relies on the recommendation. The record shows that such reliance is indeed weighty. *The record evidence is that he follows the recommendation in all of the cases that reach him. Based on* ***this*** *evidence, we conclude that the recommendations are effective recommendations.*

Mountaineer Park, Inc., 343 NLRB 1473, 1476 (2004) (emphasis added).

The Board in *Mountaineer Park* further explained that, to be effective, the recommendation need not be accepted in "all" cases, as the Board has found "supervisory authority to discipline where employer followed such recommendations 75 percent time." 343 NLRB at 1475 (citing *Venture*, 327 NLRB at 919).[4] Here, the Board majority, dissenting Member Hayes, and the Hearing Officer all found that DIRECTV, through its three-level review process, adopts the "vast majority" of recommendations. DIRECTV Br. 19. And as Member Hayes correctly determined, such evidence sufficiently establishes that the recommendations are effective under the Board's precedent. E.O.R. 47 n.1. For that reason alone, the majority's decision cannot stand.

There is other uncontradicted evidence that further reinforces that DIRECTV relies heavily on Field Supervisors at all levels of the ECF process. Site Manager Schultz testified, without contradiction, that Field Technicians "have been termi-

[4] As DIRECTV explained in its opening brief (at 39-41), there is no reason—and the Board offers none—why only 100-percent approval is sufficient for effective recommendation, but not 99 percent, as in the case of Field Technician Flores, or 80 percent, which is about the average at the facility.

nated *based on the recommendation of their field supervisor*." E.O.R. 69-70 (emphasis added). Field Supervisor Flores participates in any discussion between Site Manager Schultz and the Operations Manager involving termination. E.O.R. 123-125. The fact that DIRECTV "considered that [Field Supervisors'] recommendations justified the time and expense" of involving the Site Manager, the Operations Manager, and the Human Resources department also "reflects the substantial significance attached to [those recommendations]." *S. Airways*, 290 F.2d at 524; *see also* DIRECTV Br. 33 (citing decisions of the Fourth and Fifth Circuits making same point).

IV. Field Supervisors' Recommendations, At The Very Minimum, Have The "Real Potential To Lead To An Impact On Employment."

Section 2(11) requires only that the recommended discipline "has the real *potential* to lead to an impact on employment." *Progressive Transp.*, 340 NLRB at 1046 (emphasis added). The uncontradicted evidence more than satisfies that standard. The ECFs set forth levels of discipline, up to and including termination, which Field Supervisors have recommended. DIRECTV Br. 44-45. "With respect to lesser degrees of discipline, … a copy [of the ECF] is placed in the personnel file, where it may be used as the basis for future disciplinary action." E.O.R. 48 (Hayes, dissenting); E.O.R. 15 (Hearing Officer finding same); Board Br. 7 (acknowledging same).

Given this evidence, the Board does not dispute that the recommendations have the "real potential to lead to an impact on employment." Instead, the Board urges this Court to impose two additional requirements that have no basis in Section 2(11) or the Board's own precedent.

First, the Board argues (at 26) that DIRECTV failed to establish that the ECFs concerning lesser degrees of discipline (such as a warning) are part of a progressive disciplinary policy because none of the ECFs introduced into evidence expressly "reference [a] first" ECF. *See also* E.O.R. 46 n.13 (majority requiring notices to "expressly reference[]" prior discipline). The Board argues (at 26) that there was evidence in *Progressive Transportation* of suspension notices that referenced prior, lesser discipline. But the Board in *Progressive Transportation* made clear that such evidence was not necessary because "*the very format of the notices* shows that the Employer follows a progressive system." 340 NLRB at 1046 (emphasis added). Here, the Board does not dispute (at 26) that the format of the ECFs is indistinguishable from the format of the notices in *Progressive Transportation*—thereby requiring the same conclusion. DIRECTV Br. 47-48.

Second, the Board argues (at 28) that there are insufficient "tangible examples" of Field Supervisors' authority. Yet the evidence is more than sufficiently specific. There is record evidence on the average number of Field Supervisor-initiated ECFs, the types of discipline recommended, and the acceptance rate. DI-

RECTV Br. 18-19. Site Manager Schultz testified that there were 10-12 termination cases between December 2009 and June 2010. E.O.R. 78. In almost every case, a Field Supervisor initially recommended the termination. *Id*. DIRECTV corroborated that testimony with the testimony of a specific Field Supervisor (Flores) and numerous ECF forms showing that there is a progressive disciplinary policy where Field Supervisors have recommended discipline up to and including termination. DIRECTV Br. 14-15, 18-19. The Sixth Circuit has held that it is error for the Board to discount similar evidence—*i.e.*, testimony that "the Company officials at a higher level have administered discipline on the basis of that (dispatcher's) recommendation." *E. Greyhound*, 337 F.2d at 89 n.2.[5]

V. Even If Field Supervisors "Technically May Not Satisfy The Statutory Criteria Of Section 2(11)," They "Nevertheless May Be Accorded Supervisory Status" Because They Are "Perceived To Be Supervisor[s] By Other Employees."

The Board misconstrues this Court's decision in *NLRB v. Chicago Metallic Corp.*, 794 F.2d 527 (9th Cir. 1986), when it insists (at 31) that "[i]n order for secondary indicia to be relevant, a party seeking to establish supervisory status must first prove that the individuals in question possess statutory indicia of supervisory authority." In *Chicago Metallic*, this Court clearly held that the *perception* of supervisory authority may be sufficient:

[5] This Court has cited *Eastern Greyhound* for the related proposition that "actual existence of supervisory authority rather than its exercise is determinative." *NLRB v. Gray Line Tours, Inc.*, 461 F.2d 763, 764 (9th Cir. 1972).

- "An employee who technically *may* ***not*** satisfy the statutory criteria of Section 2(11) nevertheless *may* be accorded supervisory status when he is perceived to be a supervisor by other employees";

- "The Supreme Court has recognized that, in election cases, acts of *perceived* supervisors are to be accorded the *same* weight as those of *actual* supervisors";

- "In such borderline cases *where satisfaction of the statutory criteria is fairly debatable*, the perception of fellow employees weighs more heavily"; and

- "[T]he ALJ concluded: The fact that the employees may perceive Picazzo as a supervisor … is not determinative because the facts herein show that Picazzo is *not* exercising supervisory authority. *This conclusion cannot stand*."

Id. at 531-32 (emphases added).[6]

The Board and the Union do not dispute that Field Technicians perceive Field Supervisors as their supervisors. DIRECTV Br. 49-50. Therefore, even if the Court were to find that Field Supervisors "technically" do not "satisfy the statutory criteria of Section 2(11)," they nonetheless should be "accorded supervisory status" pursuant to *Chicago Metallic*, 794 F.2d at 532.

[6] The Board's position also makes no sense. If examining secondary indicia is appropriate only when the purported supervisor "possess[es] statutory indicia of supervisory authority," there would never be a need to examine secondary indicia. Board Br. 31.

CONCLUSION

For the reasons set forth above, the NLRB's cross-petition for enforcement should be denied, the Board's decisions should be vacated, and the results of the April 16, 2010 election should be set aside.

Dated: October, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Reply Brief of Petitioner DIRECTV Holdings, LLC, has been filed by electronic case filing and served on counsel of record through the Court's Notice of Docket Activity on this 2 day of October 2015.

Dated: October 2, 2015

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Undersigned counsel certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,092 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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9th Circuit Case Number(s) 15-70329 (L), 15-70345

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